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In the Supreme Court of the United States

OCTOBER TERM, 1982

RANDALL DIVISION OF TEXTRON, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by giving preference to current employees over reinstated strikers in filling vacant special-rated positions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 687 F.2d 1240. The decision and order of the National Labor Relations Board (Pet. App. 19a-55a) are reported at 257 N.L.R.B. 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 56a-60a) was entered on November 1, 1982. The petition for a writ of certiorari was filed on January 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et. seq.* are set forth in the petition (Pet. App. 1b).

STATEMENT

1. Petitioner manufactures automotive trim (Pet. App. 24a; Tr. 624-625).[1] Its production and maintenance workers, who are represented by Local No. 1249 of the United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union"), are divided into essentially two categories: "production workers," who require no special skills; and "special rated" employees, who work in skilled, more highly paid job classifications (Pet. App. 25a-26a; Tr. 24, 42, 46, 612-614). While production workers were transferred as needed among various departments and production jobs at petitioner's sole discretion (Pet. App. 25a, 30a; Tr. 639), the 1974-1977 contract between petitioner and the Union provided that permanent job vacancies in the special-rated classifications were to be posted so that employees could bid for them. Assignment to most special-rated jobs was based on qualifications and, if the qualifications of bidding employees were relatively equal, on seniority. Other special-rated jobs were awarded on the basis of seniority (Pet. App. 34a-35a; G.C. Exh. 4, at 10, 16). However, if a vacancy in a special-rated position was for ten days or less, petitioner was permitted to forgo the posting procedure and to assign employees at will (Pet. App. 30a; G.C. Exh. 4, at 17).

Negotiations for a new collective bargaining agreement began in the summer of 1977. Following failure to reach a new agreement by September 8, one week after the expiration of the old agreement, the Union commenced an economic strike that was joined by all but a handful of the unit employees. (Pet. App. 26a-27a; Tr. 25-26, 650.) Petitioner immediately began hiring strike replacements. Over the

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[1] "Tr." refers to the transcript of the hearing in the unfair labor practice proceeding; "G.C. Exh." refers to the exhibits introduced by the Board's General Counsel at that proceeding.

next several weeks, a number of strikers returned to work. When all available positions were filled by replacements and returning strikers, petitioner kept a sign-up list for strikers wishing to return and then recalled them, as vacancies arose, in the order in which they had signed up. (Pet. App. 29a; Tr. 28-33, 65-69, 76-77, G.C. Exh. 29(b) and 6.)

The Union ended the strike on October 16 and submitted a reinstatement request on behalf of the remaining strikers (Pet. App. 27a; Tr. 33, 39, G.C. Exh. 7). Because no job vacancies were available at that time, petitioner did not immediately reinstate strikers. As vacancies occurred in the "production worker" classification, petitioner offered reinstatement first to those strikers who had signed petitioner's list and then to the remaining strikers on the Union's list, which gave preference on the basis of seniority. (Pet. App. 29a; Tr. 43, 71-72, 836.) If, however, a vacancy arose in the "special-rated" classifications, petitioner first attempted to fill the vacancy with an employee currently working in the plant. Only if no such qualified employee was found did petitioner permit unreinstated strikers to bid. (Pet. App. 29a; Tr. 44, 74-75, 83-84, 836.)

2. Adopting the decision of the administrative law judge, the National Labor Relations Board found, inter alia, that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by giving strike replacements preference over unreinstated strikers in filling vacancies in the special-rated classifications.

Based upon petitioner's pre-strike practice and the collective bargaining agreement, the Administrative Law Judge (ALJ) held (Pet. App. 30a-31a) that no vacancy occurred when petitioner transferred employees on a short-term basis. The ALJ wrote (*id.* at 30a): "[D]ue to the differing types of production orders which arise weekly (or more often), there is a need for [petitioner] frequently to transfer

production employees from one department to another in order to care for such production schedules. Thus, in such cases, an employee, or employees, may be transferred from one department to another for a short period of time to work on a similar machine in the latter department in order to satisfy the production requirement." The ALJ also held that petitioner had shown a valid business justification for filling production job vacancies by permanent transfers of employees already on the payroll rather than by recalling unreinstated strikers (*id.* at 33a-36a). The ALJ noted (*id.* at 34a) "that, under the prior contract, [petitioner] was free to make interdepartmental moves of similarly rated employees when needed so long as least senior employees were those affected. * * * * This provision was doubtlessly inserted in the contract to enable the Company to transfer employees freely within the plant to similar job functions. The record shows that this policy continued during and after the strike. Thus, no discriminatory motive may be gleaned from a change in means or method of production * * *" (*id.* at 34a).

The ALJ took a different view of petitioner's post-strike practice of posting vacant special-rated positions for bidding by employees then on the payroll and considering unreinstated strikers only if there were no successful bidders on the payroll. The ALJ found that the posted, special-rated positions created job vacancies and that petitioner had failed to establish a business justification for refusing to offer those openings to the unreinstated strikers. He stated (Pet App. 32a-33a): "Whether the special rated job opening arose as a result of a departure from the plant of a permanent replacement or a reinstated striker, or whether it arose from a need by [petitioner] to add to its workforce, the fact remains that a job opening arose for which a striker was qualified and available, and that he was admittedly denied the opportunity even to bid for such job without a showing

by [petitioner] of a substantial and legitimate business reason therefor."

The Board ordered petitioner to offer reinstatement and back pay to those strikers who were not reinstated as a consequence of the unfair labor practice (Pet. App. 20a-2la, 53a-54a).

3. The court of appeals enforced this portion of the Board's order, holding that petitioner's "policy of first offering all special-rated job openings to employees on the payroll instead of to unreinstated strikers discriminated against the strikers on the basis of their participation in union activity" (Pet. App. 5a). The court rejected petitioner's contention that openings that could be filled from within the existing workforce, as opposed to those "resulting from expansion of the workforce" (*id.* at 6a), did not create vacant positions. The court stated (*id.* at 6a; footnote omitted):

> The NLRB's conclusion that special-rated job openings were vacancies which should have been offered to strikers is supported by the posting procedure for such positions contained in the expired collective-bargaining agreement. Thus, prior to the strike, Randall did not unilaterally move employees into special-rated openings, but rather awarded those positions to the most qualified and senior employees who applied. The NLRB decided that Randall's post-strike policy of preferentially considering active employees for special-rated openings discriminated against strikers, because at least some of the openings appeared when replacements left. The preference was given regardless of how an opening arose, and not just when Randall was reshuffling its work force.

The court added (Pet. App. 10a-11a; footnote omitted):

> The record shows that continuously from the end of the strike, while certain strike replacements departed, others were transferred to special-rated jobs, and still others were rehired and recalled from inactive status, all during the same periods of time as some strikers were being reinstated. Whether or not these events were causally related, the practical effect of Randall's procedure, * * * was to make it less likely that strikers would be reinstated to higher-paying positions. Randall's procedure was discriminatory in the same sense as the grant of superseniority in [*NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963)]. Randall gave an additional preference besides permanence to those who remained at work as opposed to those who struck, despite the fact that the latter were still "employees" for legal purposes.

ARGUMENT

Both economic and unfair labor practice strikers retain their status as "employees" under the Act[2] and are thus entitled after the conclusion of the strike to full reinstatement to their former positions without prejudice to their seniority or other employment rights. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). An employer who denies such reinstatement violates Section 8(a)(1) and (3) of the Act unless he "can show that his action was due to 'legitimate and

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[2]Section 2(3) of the Act, 29 U.S.C. 152(3), defines "employee as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *."

and substantial business justifications.' " *NLRB* v. *Fleetwood Trailer Co., supra*, 389 U.S. at 378, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). During an economic strike, an employer may hire permanent replacement employees whom he need not displace in order to create vacancies for strikers seeking reinstatement. 389 U.S. at 379; *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). This is so because the "need for the employer to assure permanent employment to the replacements so that the necessary labor force can be obtained to maintain operations during a strike" provides the " 'legitimate and substantial business justification' for requiring replaced economic strikers to wait for reinstatement until a vacancy occurs in the labor force." *Laidlaw Corp.* v. *NLRB, supra*, 414 F.2d at 105, quoting *NLRB* v. *Fleetwood Trailer Co., supra*, 389 U.S. at 379.

However, even in the case of an economic strike, an employer cannot burden the statutory right to strike by granting those who work during the strike a post-strike advantage over strikers. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 223, 236-237 (1963) (an employer cannot lawfully grant replacements or nonstriking employees fictional seniority rights in order to protect them from—and subject the strikers to—future layoffs or terminations).[3] Such

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[3]See also, *e.g.*, *Rogers Manufacturing Co.* v. *NLRB*, 486 F.2d 644, 646-648 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974) (right to strike abridged where employer denies employees seeking reinstatement full credit for their previously accrued seniority); *Great Lakes Carbon Corp.* v. *NLRB*, 360 F.2d 19, 20-21 (4th cir. 1966) (right to strike abridged where employer grants employees who abandon a strike preference with respect to protection from layoff, preferred shifts, and other employment rights); *Swarco, Inc.* v. *NLRB*, 303 F.2d 668, 670-673 (6th Cir. 1962), cert. denied, 373 U.S. 931 (1963) (right to strike abridged where employer promises employees who abandon a strike immunity from "bumping" by later returning strikers with greater seniority).

action is so "inherently destructive" of the right to strike as to be unlawful without the need of further inquiry into the employer's motivation. 373 U.S. at 231, 236-237; *NLRB* v. *Great Dane Trailers, Inc., supra*, 388 U.S. at 34. In this case, the Board and court of appeals correctly concluded that petitioner's conduct—preferring current employees over unreinstated strikers in filling special-rated positions—constituted just such an impermissible burden upon the right to strike.

Petitioner contends (Pet. 11) that the special-rated vacancies were "jobs activated by fluctuating production demands that could be filled by a reshuffling of the current workforce" and that it was therefore improper to require petitioner to offer those openings to the strikers. As previously noted, however, in those instances in which the Board found that vacancies were actually created by fluctuating production demands, it found that petitioner had acted lawfully in filling them from the current workforce. However, the Board and the court of appeals found that the posted special-rated openings were true vacancies and that petitioner had not provided any valid business justification for preventing the unreinstated strikers from bidding for them. To the extent that petitioner challenges the findings below concerning the nature of the particular vacancies at issue here, petitioner raises a factual issue that does not warrant further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

There is also no merit to petitioner's contention (Pet. 11-12) that it was entitled to offer the special-rated openings to employees already on the payroll because those openings did not occur as a result of an expansion of the workforce. The vacancies at issue occurred in job classifications different from those occupied by the strike replacements. Thus, no strike replacement would have been displaced from his current position if those vacancies had been filled by

unreinstated strikers. To be sure, a strike replacement who might otherwise have been laid off might have been able to remain on the payroll if given preference for a vacant special-rated position, but under petitioner's pre-strike practice, such vacancies were not offered to employees who otherwise would have been laid off. Instead, those vacancies were posted and filled on the basis of seniority and skill.[4] Accordingly, as the Board and the court of appeals concluded, petitioner's new system of awarding special-rated openings went beyond guaranteeing strike replacements the permanent positions sanctioned in *Mackay* and amounted to the kind of superior job security or tenure rights prohibited by *Erie Resistor*.[5]

Contrary to petitioner's contention (Pet. 13-15), there is no confilct between this case and the Seventh Circuit's decision in *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (1982). In that case, the court held that the employer did not commit an unfair labor practice by giving laid-off workers recall rights superior to those of unreinstated strikers. The court distinguished cases holding that unreinstated strikers have a right to reinstatement when a vacancy occurs, stating (*id.* at 931):

> A layoff, by definition, is not a termination of the employment relationship * * *. There is, therefore, no creation of a "vacancy" in the work force which would entitle a striker to reinstatement * * *.

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[4]The collective bargaining agreement upon which petitioner's pre-strike practice was based also made no distinction between employees on the payroll and those awaiting recall for purposes of bidding on special-rated jobs (G.C. Exh. 4, at 16, 13).

[5]The preference granted by petitioner in this case has essentially the same result as the grant of super-seniority for layoff purposes in *Erie Resistor*. The priority given effectively acts as protection against layoff so that the current employee whose job would otherwise be eliminated retains his "active" status to the permanent disadvantage of the unreinstated strikers.

The present case, by contrast, does not involve the rights of laid-off replacements, and the court of appeals expressly agreed (Pet. App. 12a) with *Giddings & Lewis* that "the lay-off of a permanent replacement, who had been given a definite expectation of recall, did not amount to a 'vacancy.' " However, the court concluded, 675 F.2d at 931, that the Board had "permissibly treated openings in special-rated jobs as 'vacancies.' "

There is also no conflict between the present case and *Lodges 743 & 1746, IAM* v. *United Aircraft Corp.*, 534 F.2d 422, 442 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976) (Pet. 15-16). There, the court held that *Erie Resistor* did not preclude a strike settlement agreement that permitted the transfer of strike replacements in order to correct production imbalances *caused by the strike*. The court noted that the permanent employment offered to replacements would be illusory if they were required to "be laid off as a result of production adjustments made necessary by the same strike" (534 F.2d at 442 n.35). Accordingly, the court concluded that the strike settlement agreement did not give the replacements the kind of enhanced seniority found impermissible in *Erie Resistor*. Here, on the other hand, petitioner's system of filling special-rated vacancies went beyond protecting strike replacements against adjustments caused by the termination of the strike and granted them preference over unreinstated strikers in the competition for new, more desirable openings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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